

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO.No.448/2010**

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Decided On: 13.12.2010

RAJ KUMAR & ANR. Appellants

Through: Mr.Rajeshwar Tyagi, Adv.

Versus

State & ORS.

.... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether reporters of Local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

: MOOL CHAND GARG,J.(ORAL)

CM No.22013/2010

Allowed subject to just exceptions.

Application stands disposed of.

FAO No.448/2010

1. This appeal arises out of an order passed by the Addl. District Judge dated 05.08.2010 whereby the Addl. District judge has allowed an application filed by the respondents under Section 11 of CPC and dismissed the Probate petition No 319/06 filed by the appellant under Section 276 of Indian Succession Act seeking probate of the will dated 02.04.1998 holding that the issue had already been decided by the said Court in petition No 318/06 in which the parties were same and therefore the Court cannot try the same issue again being hit by Section 11 of CPC.

2. Briefly stated the facts of the case are that two Probate Petitions were filed in relation to two wills alleged to have been executed by late Smt. Neerta Devi on two different dates, Probate Petition No 318/06 was filed by the respondents seeking probate of the will dated

22.08.1994 and Probate Petition 319/06 was filed by appellant seeking probate of the Will dated 02.04.1998. In the Probate Petition 319/06 evidence of appellant was closed, he took no further steps to recall the order for leading evidence. Meanwhile the other connected matter i.e petition No 318/06 filed by the respondents was decided in favour of the respondents.

3. The appellants who were arrayed as respondents in the aforesaid probate petition raised objections to the grant of probate to the will dated 22.08.1994 by alleging that the said will was a forged and fabricated one and the testatrix has executed another will dated 2.4.1998 propounded by them. However, to prove that Will no evidence was led by them. In the said probate petition, the Additional District Judge after going through the statement of the witnesses particularly the attesting witness i.e PW 3 came to the conclusion that the will dated 22.08.1994 was validly executed by the testatrix and as there was no evidence led by the appellant. It was held that no other will was executed by the same testatrix. The issue was thus decided in favour of respondent. The appellant aggrieved by that order of the Ld. ADJ challenged it before this Court in FAO 276/2010.

4. Before this Court also appellant reiterated the same objections taken before the Ld. ADJ but had brought nothing on record to show as to what happened to the second probate petition filed by the appellants in relation to the second will which had been propounded by the appellants as the last and final will of the testatrix. This court made following observations in an order dated 20.10.2010:-

“Learned counsel for the appellant states that the probate petition filed by them with respect to the will dated 02.04.1998 bearing No.233/1999 has been dismissed by the ADJ vide the impugned order which is the subject matter of the present appeal. As such now no such petition is pending. In fact, on account of dismissal of the suit and the appeal having not been filed, the Court can presume that the appellants are not interested in revival of their probate petition which is the only defence taken by them in this appeal. It may, however, be observed that they intend to file an appeal against the order dismissing their probate petition.”

5 This court also observed that:-

15. In any event the appellants having not brought on record the second will which they state was the last and final will of deceased Nerta Devi and failed to prove the said Will they cannot now question the probate of registered will left by late Smt. Nerta Devi. It many a times happens for various reasons that Will are executed in favour of persons who are not the legal heirs of the deceased. As such it cannot be a good reason to discard the Will of the deceased executed in favour of the respondent only because the appellants who are the sons of the deceased have not been made the beneficiary.

17. Accordingly, I find no reason to interfere with the judgment of the Addl. District Judge. The appeal is dismissed at this stage itself with no orders as to cost.”

6. Before the passing of the aforesaid order in FAO No.276/2010 by this Court, and after having won in the court of the ADJ, the respondents also moved an application under Section 11 of CPC in the Probate Petition No 319/06 which was heard by the Addl. District judge and was allowed vide an order dated 05.08.2010 holding that the probate petition No 319/06 is barred by the principles of Res Judicata. Appellant aggrieved by this order of the ADJ has again filed an appeal before this Court. The relevant extract of the order of the ADJ is observed here as under:-

“Applicant Bhudev Prasad had filed a petition U/s 276 of the Act seeking probate of a Will allegedly executed by the same Testatrix, in his favour on 22.08.1994, which has been decided by this Court vide its order /Judgment dated 25.03.2010.

It is submitted by Ld. Counsel for applicant/ respondent that both of these cases re pending between the same parties and issue as to whether deceased Neerta Devi had validly executed a Will dated 22.08.1994 while in sound disposing mind or that it was the last Will and the testament of the deceased was framed and has been duly decided by this Court. Due to said reason, present petition is hit by principles of res-judicata. Ld. Counsel took me through judgment of said case, where following was observed by the Court.

“From the statements of PW1..... And other witnesses particularly attesting witness

i.e. PW3 it is proved that Will in question was validly executed by the testatrix in her sound and disposing mind. On the other hand, it is not proved that any other Will was also executed by the same testatrix.”

It is not denied that the present petitioner was also a party in said case being an objector. Section 11 of CPC bars the court from trying any suit of issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit which such issue has been substantially raised, and has been heard and finally decided by such Court.

As mentioned above, it is not disputed by the petitioner that parties in both case are same and aforementioned petition was decided by the said Court and same was competent to try petition in hands i.e subsequent suit.

On the basis of above discussion, in my opinion, this court cannot try same issue again being hit by Section 11 of CPC. Application is thus allowed

7. I have heard the submissions of the appellant, who contends that at the time of filing of the present probate petition, the matter of the earlier probate case No. 318/06 had not attained finality and was still sub-judice before this Court in FAO 276/2010.

8. At this juncture, it would be appropriate to take note of Section 11 of CPC, which reads as under:-

11. Res judicata -No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.-The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.-For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.-The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.-Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.-Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.-The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

9. The issue as to whether will dated 22.08.1994 left by deceased Neerta Devi was the last and final will of the said deceased was directly and substantially in issue in Probate Case No.318/2006 between the same parties inasmuch as, the appellants are also claiming to be one of the legal heirs of the deceased. The objection taken by them that the deceased Neerta Devi had, in fact, left another will dated 02.04.1998 was not substantiated by the appellant in that case. He also failed to prove that will even in the petition filed by him being Probate Case No.

319/2006. Thus, the judgment delivered by the ADJ in Probate Case NO. 318/2006 attained finality and the findings returned in that case, constitutes res judicata with respect to the claim of the appellant that the will dated 22.08.1994 was not the last and final will left by Neerta Devi. The very fact that the claim lodged by the appellant on the basis of the alleged will dated 02.04.1998 being not substantiated by the appellant in those proceedings or in any independent proceedings brings an end to the litigation between the parties. After upholding the order of the ADJ by this Court in FAO No. 276/2010, the appellant is not entitled to rake up the issue again. Thus, the appeal filed by the appellant is dismissed being barred by res judicata at this stage itself. The order dated 05.08.2010 is therefore upheld. No costs.

MOOL CHAND GARG,J

DECEMBER 13, 2010

'sg/dc'